90-1648

Supreme Court, U.S.
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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

KEHR PACKAGES, INC.
JAMES MCMURTRIE
CHARLES MCMURTRIE
EMILY MCMURTRIE,

Petitioners,

v.

FIDELCOR, INC.
FIDELITY BANK, N.A.
THOMAS DONNELLY
NEIL COHEN
JAMES NOON
MARIO GIANNINI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. May a bank, its separate departments, and its parent holding companies, all of which played a role in furtherance of some aspect of criminal activity, be associated in fact to form a RICO "enterprise" under 18 U.S.C. Section 1961(4)?

2. Is a (19) nineteen month period in which respondents engaged in a series of mail fraud offenses, with the threat of future criminal activity present from the time of the occurrence of the first acts, a sufficient period of time to comprise either closed or open-ended conduct forming a pattern of racketeering activity under 18 U.S.C. Sections 1961(1) and (5)?

PARTIES TO THE PROCEEDING

The names of the parties appearing in the caption of the case were parties to the proceeding in the United States Court of Appeals For The Third Circuit and the United States District Court For The Eastern District of Pennsylvania.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING WRIT	6
1. The Court Of Appeals For The Third Circuit Has Rendered A Decision On The Components Of A RICO "Enterprise" In A Way That Conflicts With The Decisions Of Other Courts Of Appeals	6
2. The Court Of Appeals For The Third Circuit Has Interpreted The RICO "Pattern" And Its Constituent Element Of Continuity In A Way That Conflicts With This Court's Decision In *H.J. Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 299 (1989)	11
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: Page

Atlas Pile Driving Co. v. DiCon Financial Co., 886 F.2d 986 (8th Cir. 1989) 8

Atkinson v. Anadarko Bank and Trust Co., 808 F.2d 438 (5th Cir. 1987) 7,8

B.F. Hirsh, Inc. v. Enright Refining Co., 751 F.2d 628 (3d Cir. 1984) 7

Banks v. Wolk, 918 F.2d 418 (3d Cir. 1990) 6,12

Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982) 6

Bennett v. United States Trust Co., 770 F.2d 308 (2d Cir. 1985) 6,7

Bishop v. Corbitt Marine Ways, Inc., 802 F.2d 122 (5th Cir. 1986) 6

Garbade v. Great Divide Mining and Milling Corp., 831 F.2d 212 (10th Cir. 1987) 6

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 106 L.Ed.2d 295 (1989) 11,12,15,16

Haroco, Inc. v. American National Bank and Trust Company, 747 F.2d 384 (7th Cir. 1984) 7

Marshall-Silver Construction Co., Inc. v. Mendel, 894 F.2d 593 (3d Cir. 1990) 12

Masi v. Ford City Bank and Trust Co., 779 F.2d 793 (7th Cir. 1985) 6

Montesano v. Seafirst Commercial Corp., 818 F.2d 423 (5th Cir. 1987) 8

Morrow v. Black, 742 F.Supp. 1199 (E.D.N.Y. 1990) 14

NCNB Nat. Bank of North Carolina v. Tiller, 814 F.2d 931 (4th Cir. 1987) 7

Odishelidze v. Aetna Life and Casualty Co., 853 F.2d 21 (1st Cir. 1988) 6

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

Pereira v. United States, 347 U.S. 1 (1954) 14

Schmuck v. United States, 489 U.S. 705 (1989) 14

Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393 (9th Cir. 1986) 6

Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162 (3d Cir. 1989) 9,10

United States v. Computer Science Corp., 689 F.2d 1181 (4th Cir. 1982) 6,7

United States v. Comyns, 248 U.S. 349 (1919) 13

United States v. Herr, 338 F.2d 607 (7th Cir. 1964) 13

United States v. Turkette, 452 U.S. 576 (1981) 7,8

Yellow Bus Lines, Inc. v. Local Union 639, 883 F.2d 132 (D.C. Cir. 1989) 6,9

Statutes:

Federal Rule of Civil Procedure 12(b)(6) 3

Title 18, U.S.C. Section 1961(3) 6

Title 18, U.S.C. Section 1961(4) 7,10

Title 18, U.S.C. Section 1961(5) 2

Title 18, U.S.C. Section 1962(c) 3,4,6

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (A1-A40) is officially reported at 926 F.2d 1406. The Memorandum of the United States District Court is not officially reported.

JURISDICTION

The Judgment of the Court of Appeals was filed on March 6, 1991. A Petition for Rehearing was denied on March 27, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 1961(4) provides:

> "(4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;"

Title 18, United States Code, Section 1961(5) provides:

> "(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;"

STATEMENT OF THE CASE

Petitioners Kehr Packages, Inc. ("Kehr"), James McMurtrie, Charles McMurtrie and Emily McMurtrie filed suit in August, 1989, against Fidelcor, Inc., Fidelity Bank, N.A. ("Fidelity"), Thomas Donnelly, Neil Cohen, James Noon, and Mario Giannini. The Complaint contained both RICO and pendent state law claims arising from a fraudulent promise to lend money to Kehr. The substantive grounds for the RICO claims were allegations of mail fraud in violation of 18 U.S.C. Section 1341.

The United States District Court for the Eastern District of Pennsylvania dismissed Petitioners' Complaint for lack of subject matter jurisdiction, to wit, the RICO factual claims were not sufficiently alleged (A42).[1] For the same reason, the District

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1. Petitioner has filed a separate Appendix in this appeal.

Court also denied Petitioners' motion for leave to file an amended complaint, which had attached a proposed amended complaint (A48-A71).

Petitioners appealed the dismissal of the Complaint to the United States Court of Appeals for the Third Circuit. On March 6, 1991, the Third Circuit affirmed the dismissal of the Complaint. The Court of Appeals held first that for appellate purposes the Order dated May 14, 1990 of the District Court must be treated as a dismissal pursuant to Rule 12(b)(6), F.R. Civ. P.,[2] and therefore all factual allegations in the amended Complaint and all reasonable inferences that can be drawn from them must be treated as true.[3]

On the merits, the Court of Appeals held that a "pattern" was not sufficiently alleged in the complaint because the element of "continuity" was not satisfied. Viewing the scheme as open-ended, there was no threat of future criminal activity. Even viewing the scheme as closed-ended, the Court found that because Respondent Donnelly's conduct did not constitute mail fraud, the remaining illegal activity alleged did not occur over a long enough period to constitute continuous long-term fraudulent activity posing a threat of additional repeated criminal conduct.

In addition, the Court of Appeals dismissed Petitioners' claim against Fidelity under 18 U.S.C. Section 1962(c) for another reason.[4] Under this Section, courts have held that an

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2. F.R. Civ. P. 12(b)(6) allows a respondent to file a motion to dismiss a complaint for failure to state a claim upon which relief can be granted.

3. In the amended Complaint, Petitioners dropped Fidelcor, Inc. and Mario Giannini, Esquire, counsel to the bank, as defendants because after limited discovery the cause of action against them could not be supported in good faith. Moreover, the RICO claim was changed from being alleged generally in one count to being alleged in four counts as violations of 1962(a), (b), (c) and (d), respectively. The Court of Appeals held, *inter alia*, that the dismissal by the District Court of the claims under 1962(a) and (b) was appropriate. Disagreement between the majority and dissent in the Court of Appeals arose over the dismissal of the 1962(c) and (d) claims. Petitioners seek reinstatement of the 1962(c) and (d) claims through the instant Petition, which are alleged in Counts III and IV of the proposed amended Complaint (A60-A62).

4. 18 U.S.C. Section 1962(c) provides in relevant part that: "It shall be unlawful for any person employed by or associated with any enterprise . . . to

entity cannot be both an "enterprise" and a "person" or defendant. Because the Court of Appeals believed that Fidelity had been named both as a defendant and enterprise, it could not be held liable under Section 1962(c).[5]

Petitioners sought and were denied rehearing in the Court of Appeals on March 27, 1991 (A41). This Petition followed.

The facts pertinent to this appeal as set forth in the amended Complaint (A5O-A58) are as follows:

On December 12, 1986, the McMurtries entered into an agreement to purchase Kehr. Fidelity agreed to provide $4,165,000 in financing secured by the assets and accounts of Kehr, and by real estate owned by Charles McMurtrie and his wife Emily McMurtrie. The terms of the loans ranged from five to seven years. Neil Cohen and James Noon handled this loan package for Fidelity. At that time, Cohen was a commercial loan officer at the bank, and Noon was a vice-president.

The original understanding of the parties was that Fidelity would provide, as part of the total $4,165,000 loan, a credit line of $350,000 to be used as working capital for Kehr. The eventual loan agreement included a $600,000 line of credit to be used as working capital, and to finance closing costs and pay off Kehr's prior debts. However, at the settlement on December 12, James McMurtrie discovered that this line of credit would be insufficient to fund the necessary $350,000 in working capital. During the settlement, Cohen and Noon, on behalf of Fidelity, made an oral commitment to lend an additional $185,000 for working capital. Cohen and Noon knew that Kehr would operate at a deficit during 1987, and that the working capital would be critically important. In reliance on this commitment, the McMurtries closed the deal and began operating Kehr.

NOTES *(Continued)*

conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . ."

5. In the Petition for Rehearing filed in the Third Circuit, Petitioners pointed out that in the proposed amended Complaint Fidelity Bank, standing alone, was *not* the specified "enterprise," but had been combined with its parent holding companies and departments to form a group that was associated in fact as the enterprise. See paragraph 61 of amended Complaint (A58).

Between December, 1986 and August, 1987, Cohen and Noon informed James McMurtrie by telephone numerous times that the $185,000 would be available as promised. However, Cohen and Noon had no intention of providing the money and made such commitments in order to induce Petitioners to complete the settlement and to insure that Respondent Fidelity Bank would be the recipient of large monthly interest payments, profits and collateral. Between December, 1986 and July, 1988, Fidelity mailed Kehr invoices for the loan payments and, in return, Kehr mailed to Fidelity the monthly check.

By August, 1987, Cohen and Noon had left Fidelity. In September, responsibility for the Kehr loan was transferred to Thomas Donnelly, a vice-president of Fidelity. The McMurtries believed Donnelly was a high level management consultant who had lending authority. In reality, he worked in Fidelity's Asset Recovery Group, where he was responsible for protecting and recovering the bank's assets. James McMurtrie repeatedly demanded that Fidelity furnish the additional loan as promised, and Donnelly said that he would review the credit file and terms and conditions of the loans to determine whether additional funds would be advanced by Fidelity.

In addition, Donnelly told James McMurtrie that he would commission an appraisal of Kehr's assets, and asked McMurtrie to draft a "plan of attack" demonstrating how Kehr's financial situation could be improved. According to the amended Complaint, this request was part of the course of conduct of Mr. Donnelly aimed at misleading Petitioners into believing that he would attempt to secure additional working capital when his real purpose was to prepare for foreclosure on the assets of the company and the personal assets of the McMurtries. Donnelly never intended to secure additional working capital, and in fact had no lending authority.

In the summer of 1988, the McMurtries found a buyer for Kehr. Fidelity apparently had the contractual right to approve the sale, and Donnelly met with the prospective buyer on July 20, 1988. At this meeting, Donnelly announced that the Kehr loans were in default, and also disclosed for the first time that he worked in the Asset Recovery Group. On the same day,

Donnelly mailed Kehr a notice of default and confessed judgment against the collateral. The buyer continued with the transaction, but Donnelly and Fidelity undermined the agreement of sale by unreasonably delaying approval of the sale, despite knowing that the buyer faced a specific deadline. As a result, the buyer withdrew its offer. In September, 1988, Donnelly ordered Kehr to cease operations and liquidate its assets.

REASONS FOR GRANTING THE WRIT

1. The Court Of Appeals For The Third Circuit Has Rendered A Decision On The Components Of A RICO "Enterprise" In A Manner That Conflicts With The Decisions Of Other Courts Of Appeals.

Under 18 U.S.C. Section 1962(c), it is unlawful for any "person" employed by or associated with any "enterprise" to conduct or participate in the conduct of an enterprise's affairs through a pattern of racketeering activity. Most Courts of Appeals have held that the same entity cannot serve simultaneously as both the "person"[6] and "enterprise" under Section 1962(c). *Banks v. Wolk*, 918 F.2d 418, 421 (3d Cir. 1990); *Odishelidze v. Aetna Life and Casualty Co.*, 853 F.2d 21, 23 (1st Cir. 1988); *Bennett v. United States Trust Co.*, 770 F.2d 308 (2nd Cir. 1985), *cert. denied* 474 U.S. 1058 (1986); *United States v. Computer Science Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied* 459 U.S. 1104 (1983); *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122 (5th Cir. 1986); *Masi v. Ford City Bank and Trust Co.*, 779 F.2d 793 (7th Cir. 1985); *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982), *cert. denied* 464 U.S. 1008 (1983); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1396 (9th Cir. 1986); *Garbade v. Great Divide Mining and Milling Corp.*, 831 F.2d 212 (10th Cir. 1987); *Yellow Bus Lines, Inc. v. Local Union 639*, 883 F.2d 132, 139-140 (D.C. Cir. 1989).

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6. "Person" is defined in 18 U.S.C. Section 1961(3) to include "any individual or entity capable of holding a legal or beneficial interest in property."

The holdings of these cases rely upon the legislative history of RICO, which was designed to prevent the infiltration and control of legitimate businesses by criminals, who would thereafter conduct the affairs of the business through predicate acts. Under this circumstance, the enterprise is considered to be a passive actor or victim and therefore is not liable for damages flowing from the illegal operations in which it is engaged. *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2nd Cir. 1985); *B.F. Hirsh, Inc. v. Enright Refining Co.*, 751 F.2d 628, 633 (3d Cir. 1984). The logic of these holdings does not apply in a case such as the instant one, where the bank is an active wrongdoer as evidenced by the conduct of its employees.

In any event, the Courts of Appeals differ over what combination of entities or affiliated corporations may constitute an enterprise under 18 U.S.C. Section 1961(4). At a minimum, an enterprise must be a "continuing unit" with an "ascertainable structure distinct from the pattern of racketeering activity." *United States v. Turkette*, 452 U.S. 576 (1981).

In *Haroco, Inc. v. American National Bank and Trust Company*, 747 F.2d 384 (7th Cir. 1984), *aff'd. on other grounds*, 473 U.S. 606 (1985), the Court sustained the propriety of making a bank a defendant and its parent corporation the enterprise. The bank was the culpable party and conducted its racketeering activity through the affairs of its parent corporation. As the Seventh Circuit stated at p. 402: ". . . we think it virtually self-evident that a subsidiary acts on behalf of, and thus conducts the affairs of, its parent corporation . . ." (footnote omitted).

In *NCNB Nat. Bank of North Carolina v. Tiller*, 814 F.2d 931, 936 (4th Cir. 1987), the Fourth Circuit reached the opposite conclusion. In that case, the Court followed its earlier holding that a "person" is not distinct from an "enterprise" when a corporation and its wholly owned subsidiary are involved, citing *United States v. Computer Sciences Corp., supra* at 1190-1191. In the *NCNB Nat.* case, the only evidence in the record as to the relationship between the parent and the subsidiary was the fact that the former received a substantial portion of its revenues as dividends from the latter.

In *Atkinson v. Anadarko Bank and Trust Co.*, 808 F.2d 438 (5th Cir. 1987), the Fifth Circuit rejected a claim by borrowers

that a defendant bank, its holding companies and three employees constituted an "association in fact" enterprise. To establish an "association in fact" enterprise under 18 U.S.C. Section 1964(4), a plaintiff must show "evidence of an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit." *United States v. Turkette, supra.* In *Atkinson,* the Fifth Circuit noted at p. 441:

> "The record here contains no evidence that the bank, its holding company, and the three employees were associated in any manner apart from the activities of the bank. Plaintiffs wholly failed to establish the existence of any entity separate and apart from the bank. In this case, the alleged racketeering activity forming the predicate of the RICO charges was mail fraud—the mailing of false statements requesting payment of interest in excess of the agreed amount. The mailing of loan statements was an activity of the bank. There is no evidence of any other activity on the part of the alleged enterprise.
>
> In addition, there was no evidence presented that the five associates functioned as a continuing unit or formed an ongoing association. No connection was shown between the three individuals and the holding company. The only fact implicating the holding company in the alleged association was its purchase of shares of plaintiffs' notes from the bank. Reasonable jurors could not have found the existence of an enterprise separate and apart from the bank. The district court correctly set aside the jury's finding of a RICO violation."

See also *Montesano v. Seafirst Commercial Corp.,* 818 F.2d 423, 427 (5th Cir. 1987).

In two other Courts of Appeals cases, an "association in fact" enterprise was upheld in circumstances similar to the instant case. In *Atlas Pile Driving Co. v. DiCon Financial Co.,* 886 F.2d 986, 995-996 (8th Cir. 1989), a mortgage lender and its affiliated real estate development corporation were sued as persons conducting an "association in fact" enterprise composed

of themselves and other related entities involved in the construction and sale of two residential housing projects. Subconstructors sued the mortgage lender for participating in a scheme to defraud them of payment for their materials and labor. The Court held that the enterprise alleged had an existence apart from the members of which it was comprised and was a valid collective entity. Corporations may be considered associations in fact for purposes of RICO. See generally, *Yellow Bus Lines, Inc. v. Local Union 639, supra* at 140-141.

Even the Third Circuit has upheld the validity of a combination of corporations comprising an association in fact enterprise. In *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989), Shearin alleged that she was hired by Hutton Trust as an officer and Trust Counsel. Hutton Trust and Hutton, Inc. were wholly owned subsidiaries of Hutton Group. Shearin alleged that Hutton, Inc. and Hutton Group agreed upon a scheme whereby Hutton Trust would be created as a front for the purpose of charging fees to customers of Hutton, Inc. for trust services which were never performed, thereby bilking customers of the brokerage firm. Each defendant entity received funds from the scheme. Shearin alleged that she was dismissed in order to prevent her from making disclosures about the illegal activities.

In *Shearin*, defendants named in a claim under Section 1962(c) were Hutton Group and Hutton Inc. individually. This fact alone did not lead to dismissal of this claim, since the enterprise was a different entity. As the Third Circuit noted at pp. 1165-1166:

> "Shearin pleaded the existence of an enterprise. Paragraph 14 of the complaint states that 'the association of Hutton Group, Hutton Inc., and Hutton Trust . . . was an enterprise under 18 U.S.C. 1961(4) [sic].' This allegation fits the statutory definition of an enterprise as including 'any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.' 18 U.S.C. Sec. 1961(4). Interpretation of this term has been liberal, and

nothing precludes an association of corporations for illicit purposes from constituting an enterprise. . ."

In this case the "enterprise" under Section 1961(4) is described in paragraph 61 of the amended Complaint as follows (A58):

"61. Fidelity Bank and the parent holding companies, Fidelcor, Inc. and First Fidelity Bancorporation, and the Commercial Loan Department and Asset Recovery Group, together were all associated in fact and formed an enterprise as defined in 18 U.S.C. Section 1961(4)."

The Complaint alleged that Fidelcor, Inc., located in Pennsylvania, the original parent holding company of Fidelity Bank, merged with First Fidelity Bancorporation, located in New Jersey. The merger occurred on February 29, 1988, in the middle of the scheme, and created a new parent holding company, First Fidelity Bancorporation.

The amended Complaint details the fraudulent activities of Fidelity Bank and its employees who worked in the bank's Commercial Loan Department and Asset Recovery Group. In addition, the amended Complaint described in paragraphs 47 and 48 the involvement of the parent holding companies as follows (A56):

"47. Defendant Fidelity Bank's parent holding companies, Fidelcor Inc. and First Fidelity Bancorporation, conducted and continues to conduct an internal loan audit review which monitors and rates the loans of its subsidiaries. The loan review group of the parent holding company is independent of the lending units and management structure of subsidiary Fidelity Bank.

84. As a direct result of the audit of the loan to Kehr Packages, Inc. described herein conducted by the audit review group of Fidelcor Inc. and First Fidelity Bancorporation, credit reports were prepared which were relied upon by some and/or all defendants in implementing the scheme to defraud Plaintiffs."

Accordingly, the amended Complaint contains sufficient factual averments to show that the bank, its departments and their parent holding companies played roles in furtherance of the fraudulent scheme. The enterprise had the characteristics of a shared and common purpose, an ongoing organization, and its components functioned as a continuing unit. Under these circumstances, a valid RICO enterprise existed. Thus, the Third Circuit erred in holding that Fidelity Bank was the RICO enterprise and under Section 1962(c) could not be a RICO defendant.

Given the conflict that exists in the Courts of Appeals on the components of a RICO "enterprise," a writ of certiorari should be granted in order to afford Your Honorable Court the opportunity to resolve this matter.

2. The Court Of Appeals For The Third Circuit Has Interpreted The RICO Pattern And Its Constituent Element Of Continuity In A Way That Conflicts With This Court's Decision In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989)

Under 18 U.S.C. Section 1961(1) and (5), a "pattern of racketeering activity" requires the commission of at least two predicate offenses.

In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 106 L.Ed.2d 195 (1989), this Court squarely rejected the notion that this definition of pattern requires an allegation and proof of multiple "schemes" and instead adopted a flexible approach. It is "continuity" plus "relationship" of racketeering activity which combines to produce a pattern. Both tests depend heavily on the specific facts of each case.

"Continuity" of racketeering activity was described by this Court as both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct which by its very nature projects into the future with a threat of repetition.

As this Court succinctly stated in often quoted language: "A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates

extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement . . . In such cases liability depends on whether the threat of continuity is demonstrated." "Long-term criminal activity can be established either by proof that the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, or that the acts are part of an ongoing entity's regular way of doing business. Long-term associations that exist for criminal purposes can establish continuity."

A. The Pattern Of Mail Fraud Offenses Alleged In The Amended Complaint Satisfies The Requirements Of A Close-Ended Scheme

In the instant case the Third Circuit has seized upon the above language from *H.J. Inc.* and interpreted it in a way that eradicates the notion that a closed period of repeated conduct extending over a substantial period of time may constitute close-ended continuity. The amended Complaint alleged that Respondents, in carrying out their scheme, engaged in numerous acts of mail fraud, 18 U.S.C. Section 1341, during a nineteen month period from December, 1986 to July, 1988. This period of time is more than adequate to establish a closed-ended continuity occurring over a substantial period of time. As the dissent to the Third Circuit opinion points out, closed-ended continuity is primarily a question of duration, with the bottom line of a few weeks or months being insufficient to establish closed-ended continuity. See, i.e., *Marshall-Silver Construction Co., Inc. v. Mendel*, 894 F.2d 593 (3d Cir. 1990) (less than seven months insufficient) and *Banks v. Wolk*, 918 F.2d 418 (3d Cir. 1990) (eight months insufficient).

Apparently recognizing that a nineteen month period would be sufficient, the Third Circuit incorrectly reduced the length of time of the closed-ended continuity by (10) ten months by eliminating the time that Respondent Thomas Donnelly, an employee of the bank, was part of the scheme. This is accomplished in two ways. First, by discounting Donnelly's actions as not being fraudulent, and second, by describing the mailings as

"innocent," with the continuity test requiring that the focus be on the instances of deceit in the underlying fraudulent scheme.

Insofar as Donnelly is concerned, the Third Circuit inappropriately considers his conduct in isolation. Donnelly's conduct should be viewed in light of what Petitioners knew when Donnelly became part of the scheme. Respondents Cohen, Noon and Fidelity Bank initiated this fraudulent scheme through misrepresentations which caused Petitioners to put over four million dollars worth of assets at risk. When Donnelly joined the scheme as a coconspirator as alleged, he continued the misrepresentations. He said he would review the credit file and terms and conditions of the loan and have a new appraisal completed, all to determine whether additional funds could be advanced as working capital. In fact, contrary to his word, Donnelly had a "knockdown" appraisal done in order to determine the liquidation value of the assets. The amended Complaint alleged that at no time did Donnelly ever intend to assist Petitioners in obtaining additional working capital.

Under the mail fraud statute, 18 U.S.C. Section 1341, the law has long been established that a scheme to defraud may consist of suggestions and promises as to the future, when not made in good faith but with deceptive intent. *United States v. Herr*, 338 F.2d 607, 610 (7th Cir. 1964); *United States v. Comyns*, 248 U.S. 349 (1919).

Here, Donnelly engaged in such conduct. He did so to lull Petitioners into a false sense of believing that additional financing may be available to allow the business to survive. While Petitioners relied upon Donnelly's false promises, ten additional monthly payments were made on the loans containing large amounts of interest. As part of the scheme, Donnelly's object was to secure this money and then at a future date to "pull the plug" and force a liquidation. This is hardly conduct becoming a friendly banker.[7]

Furthermore, the Third Circuit appears to concede that the mailing of not only the invoices for payment but also the *return*

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7. The deception inherent in seeking a "plan of attack" and not disclosing that he worked in the Asset Recovery Group was all part of the scheme to defraud.

check to the bank is a sufficient mailing under Section 1341. "Innocent" mailings satisfy the mailing element and each mailing incident to an essential part of the scheme constitute a new violation. *Schmuck v. United States,* 489 U.S. 705, 715 (1989), *Pereira v. United States,* 347 U.S. 1, 8 (1954). The Third Circuit overlooks, however, the fact that Petitioners' factual allegations demonstrate that an inference can be drawn that monthly mailings were made almost in tandem with the false representations and omissions of Noon, Cohen and Donnelly over the nineteen month period. There was constant interplay between the bankers and Petitioners, who have no burden of showing that false statements were made exactly on the date of the mailings. These mailings were intrical to the overall scheme to enrich Respondents.[8] Under these circumstances the dissent in the Third Circuit correctly notes that the mailings were not really innocent and it confuses the analysis of what constitutes the fraudulent scheme to consider them as "innocent."

b. The Pattern Of Mail Fraud Offenses Alleged In The Complaint Also Satisfies The Requirements Of An Open-Ended Pattern

The Third Circuit also viewed the Complaint filed in this case as not alleging facts showing a threat of racketeering activity beyond the *end* of the completed scheme alleged and, as a result, held that open-ended continuity is absent.

In reaching this conclusion, critical points inherent in the *H.J. Inc.* holding are overlooked. Whether future criminal activity is threatened should be determined by examining the activity at the time of the occurrence, rather than through a hindsight evaluation when the scheme is at an end. *Morrow v. Black,* 742 F. Supp. 1199, 1207 (E.D.N.Y. 1990). "That racketeering activity lasts in actuality only a few weeks and then is

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8. As to Respondents Donnelly and Fidelity Bank, additional mailings were alleged, including the mailing of two letters in regard to payment of principal and interest and a "Notice of Default" and confessed judgments against the properties pledged as collateral for the loans (A56).

ceased because the participants are found out would not necessarily mean that at the time the activity took place, it had not threatened future criminal activity." *Id.* at 1207.

Here, if Petitioners had uncovered the scheme after ten or twelve months and then filed suit under RICO, it could be alleged in the complaint that future misrepresentations by the bankers and continued mailings of the invoices and payments would constitute the threat of future criminal activity. The same allegation is true had the scheme been uncovered at or near the time of settlement on the loan when the initial outright misrepresentations were made.

The fact is that by the Third Circuit misapplying the precepts of *H.J. Inc.*, the wrongdoers – Respondents – are being rewarded for allegedly ending the scheme on July 20, 1988 when Donnelly announced that he worked in the Asset Recovery Group and declared the loans in default.[9] These facts ended the scheme only in the context of viewing it as closed-ended. But these facts do not diminish the magnitude of the past conduct in this case which by its nature projected into the future with the threat of repetition. This conduct is sufficient to establish "continuity" under the *H.J. Inc.* test, *supra.*

Whether the fraudulent scheme alleged in the amended Complaint is considered to be close-ended over an eight, ten or nineteen month period, it is still sufficient to meet the requirements of continuity. The same is true if the illegal scheme is viewed as open-ended. Under these circumstances, it is apparent that the clues set forth in *H.J. Inc.* are inadequate to foster a meaningful concept of pattern among the lower federal courts. Further clarification is needed to afford them guidance in determining what acts constitute a RICO pattern.

In summary, this case amply demonstrates what the Honorable Antonin Scalia noted in his dissent in *H.J. Inc.* – "that at least a few months of racketeering activity (and who know how

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9. Needless to say, the effects of the scheme continue to date. As alleged in paragraph 56 of the amended Complaint, Respondents have seized personal bank accounts and assets of Petitioners; have executed and attempted to execute judgments on the real estate of Charles and Emily McMurtrie; have sold the real estate and machinery and equipment of Kehr Packages, Inc.; garnished rents, and forced the McMurtries to declare bankruptcy (A58).

much more?) is generally for free, as far as RICO is concerned." 106 L.Ed.2d at 217.

CONCLUSION

For all of these reasons, Petitioners respectfully request that their Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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